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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

GUILLERMO ARIAS,

Plaintiff and Respondent,

v.

KYLE MCDARIS et al.,

Defendants and Appellants.

B254163

(Los Angeles County
Super. Ct. No. PC053931)

APPEAL from a judgment of the Superior Court of Los Angeles County, John J. Krali, Judge. Affirmed as modified.

Gray • Duffy, Jack M. Liebhaber for Defendants and Appellants.

Law Office of Gerald Philip Peters and Gerald P. Peters for Plaintiff and Respondent.

* * * * *

Defendants Kyle McDaris and his father Steven McDaris (together defendants) appeal a judgment in this personal injury case following a jury verdict in favor of plaintiff Guillermo Arias in the amount of \$128,127.36 and an award of costs to Arias in the amount of \$29,080.16. Defendants raise a host of errors. We find merit in their argument the trial court erroneously admitted two of Arias's medical bills totaling \$2,281.34 that were inadmissible hearsay, and we will reduce the judgment by that amount. We reject defendants' remaining contentions and affirm the judgment as modified.

BACKGROUND

Arias filed this personal injury action following a November 17, 2011 automobile accident during which the 2001 Toyota Tundra he was driving and the 2001 Honda Civic Kyle McDaris was driving collided. Kyle McDaris's sister Lindsay McDaris was a passenger in his car at the time, and his father Steven McDaris was the registered owner.

The accident occurred in the northbound lanes of San Fernando Road in the City of Los Angeles. The parties gave conflicting accounts of what happened. Arias testified he was traveling northbound when Kyle McDaris, traveling southbound, crossed the yellow line and hit Arias's truck, pushing it onto the curb. He said Kyle McDaris told him after the accident that he was "very sorry for what happened but that he had fallen asleep at the wheel." Arias testified the truck was not drivable after it came to rest and he did not attempt to drive it.

In contrast, Kyle McDaris told officers at the scene he was traveling northbound when Arias, traveling southbound, crossed the yellow line. At his deposition, however, Kyle McDaris testified he was traveling southbound at the time of the accident. He also testified at his deposition he told his father he was traveling southbound. At trial, he could not recall which direction he was traveling. He denied telling Arias he had fallen asleep. After the collision, his car ended up in the northbound number one lane facing northeast.

Lindsay McDaris testified Kyle McDaris was traveling northbound and Arias was traveling southbound. She claimed after the accident Arias reversed his truck, turned around, and went up the street to park, facing northbound.

Los Angeles Police Department Officers Danny Martinez and Rhiannon Talley responded to the scene. The officers noted both vehicles were damaged on their left front, all accident debris remained in the northbound lanes of road, and the road had scrape marks on the northbound side, but not on the southbound side. Neither car was drivable given the damage, and they could not have been moved. Nor was there any fluid or debris suggesting Arias moved his truck after the accident.

The officers spoke with Lutin Ross, an independent witness, who told them he was going southbound on San Fernando Road, following Arias's truck, which was also going southbound, when Arias's truck drifted over and collided with Kyle McDaris's car. The officers did not credit his account because it conflicted with the physical evidence at the scene.

The officers watched security video footage from a nearby business. Although it did not capture the license plates or drivers of any vehicles, the officers concluded it showed Kyle McDaris's Honda traveling southbound with Ross's vehicle behind it and Arias's truck traveling northbound. It did not show the accident itself. At trial, Kyle McDaris testified he did not know if the vehicles depicted on the footage were his and Arias's.

Based on the physical evidence at the scene and the security video, the officers concluded Kyle McDaris was traveling southbound and Arias was traveling northbound, and Kyle McDaris's car crossed the yellow line.

The balance of the trial was devoted to evidence of Arias's injuries from the accident. Arias was wearing his seatbelt and during the collision, his seatbelt tightened and the air bags deployed. He hit his left shoulder against the window and door. At the scene he complained about back pain, but he did not begin experiencing pain in his shoulder until three to four hours after the accident. He testified he had no problems with his shoulder before the accident; and one month before the accident, he saw a doctor for a routine checkup and did not complain of any pain. Before the accident he was able to work full time but after he did not do much work.¹

¹ He did not claim lost earnings as part of his damages, however.

A few days after the accident, he visited Dr. Steinberg, a chiropractor, through a referral by his attorney. He had complaints of pain in his left foot, left arm, upper and lower back, neck, and shoulder. Dr. Steinberg treated Arias's shoulder with hot packs and massage. Over the next two months, therapy improved Arias's back and neck pain.

Based upon Dr. Steinberg's recommendation, Arias saw Dr. Gary E. Brazina, an orthopedic surgeon, who gave him a cortizone-type injection to his shoulder. An MRI (magnetic resonance imaging) ordered by Dr. Brazina revealed a partial thickness tear of Arias's rotator cuff.

Arias then visited Dr. Jacob Tauber, another orthopedic surgeon, who sent him to therapy on his shoulder for three months and gave him another cortizone-type injection. There was no improvement. Another MRI ordered by Dr. Tauber showed a small full thickness tear to Arias's rotator cuff, which was worse than a partial thickness tear. Given the persistent pain and the ineffectiveness of more conservative measures, Dr. Tauber performed surgery on Arias's shoulder. Arias agreed to the surgery because the pain was "unbearable" and he was unable to work easily.

Following surgery, he had another three months of physical therapy. He recovered "excellent" motion, although he still could not lift heavy objects and had stabbing pains in cold weather.

At trial, Dr. Tauber opined Arias had a preexisting shoulder condition and partial rotator cuff tear before the accident that caused him no pain, but he developed shoulder pain as a result of the accident trauma.

Two doctors testified for the defense. Dr. Stephen Kay, an orthopedic surgeon, examined Arias 14 months after his shoulder surgery and agreed he had an "essentially . . . excellent" outcome with "mild residuals." Dr. Kay reviewed Arias's MRI's and concluded the first one showed a partial rotator cuff tear and the second showed a full thickness tear, neither of which was caused by the accident. Notably, he agreed with Dr. Tauber that the accident increased Arias's pain and made his shoulder condition symptomatic, but he opined the accident did not cause any structural damage. He also noted the accident caused Arias's supraspinatus tendon to become inflamed and painful.

Dr. Nicholas Carpenter, a biomechanical engineer, opined the “sideswipe” collision would have resulted in a three mile-per-hour impact between Arias’s shoulder and the door if he was leaning to the left. The impact would have pushed Arias’s arm toward his body, which would not have caused the tearing injury to his muscle tendon.

The jury concluded Kyle McDaris was negligent, which was a substantial factor in causing Arias’s injury. It awarded Arias \$70,127.36 in past economic loss, \$55,000 in past noneconomic loss, and \$3,000 in future noneconomic loss. It specifically found Arias was not negligent. The court entered judgment consistent with the verdict (\$15,000 of which was imposed jointly on Steven McDaris). Defendants timely appealed. Thereafter, the trial court entered an amended judgment awarding Arias \$29,080.16 in costs (\$12,113.79 of which was imposed jointly on Steven McDaris), along with 10 percent interest from the date of the verdict until paid. Defendants timely appealed from the amended judgment.

DISCUSSION²

1. Admission of Medical Bills

Defendants argue the trial court erroneously admitted \$45,666.46 in Arias’s medical bills because they were unauthenticated and hearsay not within any exception. Those bills were Granada Hills Radiology, \$660 (exh. 12); Gary E. Brazina, M.D., \$1,621.34 (exh. 16); Wilshire Surgicenter, \$25,984 (exh. 25); WS Physical Therapy Network, \$8,347.50 (exh. 27); Amir A. Sheikholeslam, M.D., \$2,500 (exh. 29); Advanced Medical Solutions, \$1,423.62 (exh. 32); and Reliant Medical Supplies & Orthotics, Inc., \$5,130 (exh. 33). We review the trial court’s evidentiary rulings for abuse of discretion. (*In re Troy D.* (1989) 215 Cal.App.3d 889, 902.) We will deem evidentiary rulings harmless “if the record demonstrates the judgment was supported by the rest of the evidence properly admitted.” (*Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1122.) We conclude the trial

² Arias includes a laundry list of alleged problems with defendants’ opening brief. We have already granted Arias’s motion to strike portions of defendants’ appendix. Arias has also supplemented the record with the documents missing from the appellants’ appendix. We reject Arias’s remaining complaints, although we admonish defendants in future appeals to adhere to all applicable California Rules of Court, including rule 8.204(a).

court abused its discretion in admitting the bills from Granada Hills Radiology and Gary E. Brazina, M.D., but properly admitted the remaining bills.

Before the bills were admitted into evidence, they were shown to Dr. Tauber, who opined each of them was reasonable and medically necessary. Arias later offered them into evidence during his own testimony, but defendants objected on hearsay and authentication grounds because Arias had not paid the bills, they had not been properly subpoenaed, and no declaration had been provided to establish them as business records under Evidence Code sections 1271 (business records) and 1560 (subpoena of business records). Arias was permitted to testify he had seen the bills and still owed the amounts reflected.

The trial court initially excluded the challenged bills because they lacked foundation and authentication. But the court eventually admitted all the challenged bills, citing *McAllister v. George* (1977) 73 Cal.App.3d 258 (*McAllister*) and finding the bills were not hearsay because they were admitted to show Arias incurred the expenses and Arias's and Dr. Tauber's testimony properly authenticated them.

Arias does not dispute the challenged bills did not fall within the business records exception to the hearsay rule because no custodian or other qualified witness testified to the identity and mode of preparation of each bill. (Evid. Code, § 1271, subd. (c).) For the bills from Granada Hills Radiology and Dr. Brazina, no other foundation was laid for them and they should not have been admitted over defendants' hearsay objection. Arias testified only that he had seen each bill previously and he still owed the amounts reflected in them. He did not testify the bills accurately reflected the services performed, or even that he had actually received the bills from the providers. Nor did any medical provider with personal knowledge of the procedures reflected in the bills testify the bills were accurate. Arias also did not testify he paid the bills, which would have provided some measure of assurance they were accurate. Arias suggests the distinction between paid and unpaid bills is inconsequential, but "[t]he reason for this rule is a recognition that a person who receives a bill has 'every interest to dispute its accuracy or reasonableness if there is reason to do so. Thus, if a bill or invoice is paid, the court is assured of the accuracy and reasonableness of the charges.'" (*Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1268.)

This case is therefore unlike *McAllister*, in which the court concluded the trial court erroneously excluded a bill for dental services when the plaintiff testified the services were performed and he received and *paid* the bill. (*McAllister, supra*, 73 Cal.App.3d at p. 263.) “This testimony was sufficient evidence of the circumstances surrounding the document to sustain a finding that it was what its contents purported to be, a bill for dental services rendered. The sending of an invoice is a circumstance which normally flows from the performance of professional services. The bill, by referring to the same matters testified to by plaintiff, matters as to which only plaintiff and the party who performed the dental services would likely have knowledge, was authenticated by its contents in light of the circumstances.” (*Ibid.*) The court also rejected the defendant’s hearsay objection because the plaintiff “testified that the dental services were performed, that he received a bill for them, and that he *paid the bill*. It has been held that under such circumstances the bill, which ordinarily would constitute inadmissible hearsay, is nevertheless admissible for the limited purpose of corroborating plaintiff’s testimony and showing that the charges were reasonable.” (*Ibid.*, citing *Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 42-43 (*Pacific Gas*), italics added.)

Similarly, in *Pacific Gas*, our Supreme Court opined, “Since invoices, bills, and receipts for repairs are hearsay, they are inadmissible independently to prove that liability for the repairs was incurred, that payment was made, or that the charges were reasonable. [Citations.] If, however, a party testifies that he incurred or discharged a liability for repairs, any of these documents may be admitted for the limited purpose of corroborating his testimony [citations], and *if the charges were paid*, the testimony and documents are evidence that the charges were reasonable. [Citations.] *Since there was testimony in the present case that the invoices had been paid, the trial court did not err in admitting them.*” (*Pacific Gas, supra*, 69 Cal.2d 33 at pp. 42-43, italics added.)

In contrast, even though Arias did not pay his other bills, they were admissible because they were all related to Dr. Tauber’s treatment of Arias, and Dr. Tauber testified the

charges in those bills were reasonable and medically necessary.³ In light of Dr. Tauber's testimony, the trial court was adequately assured of their accuracy and authenticity and properly admitted them over defendants' objections.

Thus, the trial court abused its discretion in admitting the bills from Granada Hills Radiology and Dr. Brazina. This error was prejudicial because there was no other evidence to support this portion of Arias's claimed damages and the jury awarded \$70,127.36 in past economic loss, which coincided exactly with the medical bills the trial court admitted.

We therefore find \$2,281.34 of Arias's past economic damages was improperly awarded. Given this amount is minimal, we will modify the judgment to reduce it by this amount in lieu of remanding for retrial, although Arias may inform us through a petition for rehearing if he would prefer remand and a retrial. Any retrial would be limited to the amount defendants have successfully challenged on appeal.⁴

2. Code of Civil Procedure Section 998 Offer

Defendants contend the erroneous admission of the hearsay medical bills prejudiced them because it increased Arias's total damages award above a \$100,000 settlement offer Arias made pursuant to Code of Civil Procedure section 998 (section 998), which justified the trial court's award of \$10,560 in expert witness fees and \$6,406.37 in prejudgment interest to Arias. (§ 998, subd. (d); Civ. Code, § 3291.) We reject this contention because,

³ The Wilshire Surgicenter reflected charges for the surgery by Dr. Tauber, the WS Physical Therapy Network bill reflected charges for physical therapy prescribed by Dr. Tauber, the bill from Dr. Sheikholeslam was for the surgery anesthesia based on a referral from Dr. Tauber, and the bills from Advanced Medical Solutions and Reliant Medical Supplies & Orthotics, Inc., were for postoperative supplies based on referrals from Dr. Tauber.

⁴ Defendants argue Arias's award for past economic damages must be further reduced by \$7,500 because Dr. Tauber testified that amount was not reasonable and necessary. The only support defendants cite for this argument was defense counsel's statement at closing argument. We have reviewed Dr. Tauber's testimony and cannot find any testimony to this effect. We therefore reject the contention. Defendants also request Arias's noneconomic damages be reduced in an unspecified amount because "[j]urors tend to base the amount of non-economic loss on the economic loss." The argument is not supported by any authority so we reject it.

although we have found \$2,281.34 of Arias's damages must be reversed, that only reduces Arias's total award from \$128,127.36 to \$125,846.02, still well above his section 998 offer. However, as part of this argument, defendants contend the trial court erred in finding the section 998 offer was valid, justifying the award of expert witness fees and prejudgment interest. We disagree.

Before trial, Arias made a section 998 offer to Kyle McDaris in the amount of \$100,000 inclusive of costs, which Kyle McDaris did not accept. In a motion to tax costs after trial, defendants argued Arias's section 998 offer was invalid because it was made only to Kyle McDaris and not to Steven McDaris. According to defendants, their insurance policy limit was \$100,000 and accepting the offer to compromise only on behalf of Kyle McDaris would have left Steven McDaris exposed as a defendant and opened the insurer to a bad faith coverage claim. Moreover, because Kyle McDaris's driver's license was suspended on the day of the accident, Arias might have been able amend his complaint to allege a negligent entrustment claim, exposing Steven McDaris to liability exceeding the \$15,000 statutory limit as the registered owner of the car Kyle McDaris was driving. Arias unsuccessfully attempted during trial to amend his complaint to add that claim.

The trial court rejected defendants' contentions and found the section 998 offer valid. It reasoned, "Unquestionably the offer placed the insurer, Kyle McDaris, and perhaps even Steven McDaris in a situation requiring careful consideration. The mere fact that it did so, however, is insufficient to invalidate an otherwise valid offer under [section 998]." The court further opined section 998 does not preclude separate offers, which in some cases can provide an incentive to settle and the offer made in this case was a reasonable approximation of liability in view of the verdict. Even though it was given only to Kyle McDaris, at the time of the offer the only recovery against Steven McDaris would have been joint and several for \$15,000 and Arias did not attempt to amend his complaint to assert a negligent entrustment theory during the time the offer was pending. Further, defendants did not clarify the offer and only made their own offer of \$60,000 just before trial, which was "clearly a less accurate prediction of the jury's verdict." Moreover, while insurance could be considered in evaluating the reasonableness of the offer, that factor is only one of many

and acceptance of the offer in this case might have been in the best interests of all involved, even though it would have exhausted the policy limits. The court made clear the award of expert witness fees and prejudgment interest would only be against Kyle McDaris because Steven McDaris was not given an offer.

“Whether a section 998 offer was reasonable and made in good faith is a matter left to the sound discretion of the trial court, and will not be reversed on appeal except for a clear abuse of discretion.” (*Barba v. Perez* (2008) 166 Cal.App.4th 444, 450.) Here, the trial court acted well within that discretion. It correctly noted insurance coverage may be considered in evaluating the validity of a section 998 offer, but it is only one factor among many. (*Arno v. Helinet Corp.* (2005) 130 Cal.App.4th 1019, 1026.) Nor is a section 998 offer invalid because one defendant remains exposed to liability, given that “[s]ection 998 does not require a plaintiff to make a global settlement offer to all defendants in an action, or to make an offer that resolves all aspects of a case.” (*Arno*, at p. 1026.) Here, Kyle McDaris might have settled for the insurance policy limit, even if it left Steven McDaris exposed to liability. At the time of the offer, Arias had not alleged a negligent entrustment claim against Steven McDaris, so if Kyle McDaris had settled, the low value of the remaining claim against Steven McDaris might have prompted Arias to dismiss it. Also, had Kyle McDaris settled, Steven McDaris may have been entitled to set-off for the settlement. (*Id.* at p. 1027.) A settlement might have also created an advantage for defendants if Kyle McDaris, the driver of the car, was not a defendant at trial. (*Ibid.*) The section 998 offer was also close to the jury’s verdict against *both* defendants, demonstrating it was reasonable. (*Barba, supra*, at p. 450 [“One factor to be considered by the trial court as to the reasonableness of a section 998 offer is the amount offered as compared to the judgment ultimately recovered.”].) Because the trial court did not abuse its discretion in finding Arias’s section 998 offer reasonable and in good faith, we will not disturb the trial court’s award of expert witness fees and prejudgment interest.

3. Instructional Error

Defendants argue the trial court erred in refusing to give instructions on comparative negligence (CACI No. 405) and negligence per se as to Arias (CACI No. 418). We need not

decide whether the trial court erred because there was no “reasonable probability that, in the absence of the error, a result more favorable to the appealing party would have been reached.” (*Scott v. Rayhrer* (2010) 185 Cal.App.4th 1535, 1540.) In the verdict form, the jury was asked and expressly found Arias was not negligent in the accident. When polled, all 12 jurors agreed Arias was not negligent. Thus, even if the jury was instructed on comparative negligence and negligence per se principles, it clearly would not have found him negligent and defendants would not have received a more favorable verdict. Reversal is not warranted on this ground.

4. *Testimony of Officers Talley and Martinez*

Defendants assert several challenges to the testimony of Officers Talley and Martinez, namely (1) they gave improper expert testimony when they were not qualified as accident reconstruction experts and their accident reconstruction testimony was based upon too many varying or indefinite factors; (2) if their opinions were admissible, the trial court failed to instruct the jury to accord them only so much weight as they were entitled; (3) Officer Talley improperly used two water bottles to illustrate her testimony about the movements of the parties’ vehicles; and (4) Officer Talley improperly opined witness Ross’s statement at the scene was not credible. We review the trial court’s admission of expert testimony for abuse of discretion (*Tesoro del Valle Master Homeowners Assn. v. Griffin* (2011) 200 Cal.App.4th 619, 639 (*Griffin*)) and we find no abuse here.

A. *Accident Reconstruction Experts*

Before trial, Arias designated Officers Talley and Martinez as nonretained experts. Defendants moved in limine to preclude them from testifying as accident reconstruction experts. The court tentatively denied the motion subject to hearing the officers’ testimony. At trial, both officers testified they were not accident reconstruction experts, but both had significant training and experience in accident investigation. Officer Martinez had been a police officer for over 15 years and had taken courses in accident investigation and preparation of collision reports. For two years he was a traffic collision investigator in the field and was eventually promoted to traffic investigator. He had reviewed and prepared over a thousand reports. Officer Talley had been a police officer for over 11 years and had

taken courses in traffic investigation and completion of traffic collision reports. Over the course of her career she had investigated between 5,000 and 6,000 accident cases and at the time of trial she was a traffic investigator.

Based on their experience and observations of the physical evidence at the scene of the collision and the security video, the officers opined Kyle McDaris was traveling southbound and Arias was traveling northbound, and Kyle McDaris's car crossed the yellow line. Citing *Kastner v. Los Angeles Metropolitan Transit Authority* (1965) 63 Cal.2d 52 (*Kastner*), the trial court allowed them to give these opinions because "generally officers, especially ones with extensive experience are permitted to give opinions about what occurred based on the evidence and the review of things that they see."

Courts have routinely allowed police officers to testify to the point of impact in accidents based on their law enforcement training and experience. (*Robinson v. Cable* (1961) 55 Cal.2d 425, 429; *Kastner, supra*, 63 Cal.2d at p. 58; *People v. Haeussler* (1953) 41 Cal.2d 252, 260-261; *Francis v. Sauve* (1963) 222 Cal.App.2d 102, 114; *Zelayeta v. Pacific Greyhound Lines* (1951) 104 Cal.App.2d 716, 727; *Wells Truckways v. Cebrian* (1954) 122 Cal.App.2d 666, 677-678 (*Wells Truckways*); 1 Witkin, Cal. Evidence (5th ed. 2012) § 60, p. 718.) Both Officer Talley and Officer Martinez had extensive training in accident investigation and had investigated thousands of vehicle accidents and the cause of the collision in this case was not so obvious that their expertise would not have assisted the jury, so the trial court did not abuse its discretion in allowing them to give their opinions about the direction and point of impact of the vehicles. (See *Kastner, supra*, at p. 57; *Zelayeta, supra*, at p. 727.)⁵

Defendants cite *Fishman v. Silva* (1931) 116 Cal.App. 1 and other cases to suggest expert reconstruction of an automobile collision is inadmissible because it involves too

⁵ In their briefs defendants discuss the law related to expert opinions based on hearsay statements, but the officers did not rely on hearsay in rendering their opinions. Quite the opposite. They *disbelieved* Ross when he told them he was traveling southbound behind Arias's truck because that statement conflicted with the physical evidence at the scene. Thus, their opinions were not infirm for this reason.

many varying factors like “indefinite rate of speed, condition of the highway, judgment or lack thereof in the drivers, a direct blow or a glancing one, and the balance or equilibrium of each car at the time of impact.” (*Id.* at p. 3.) To the extent Officers Martinez and Talley might have testified about some of these factors, we agree with the criticism of *Fishman* in *Box v. California Date Growers Assn.* (1976) 57 Cal.App.3d 266. There the court distinguished *Fishman* because “the hypothetical question sought to be propounded was found to be deficient. Along with the fact that accident reconstruction was a relatively new field in 1931 and had not progressed to the position it presently occupies, it is unlikely that the ‘expert[]’ in [*Fishman*] would be permitted to render an opinion on the same question today. [¶] . . . [¶] The object of accident reconstruction is to reach satisfactory -- not infallible -- conclusions as to the operational factors and dynamic situation contributing to the collision. It is as impossible to reconstruct an accident with absolute accuracy as for a witness to relate precisely what occurred. Nevertheless, expert reconstruction often is more accurate than statements of witnesses. ‘It would not be uncommon for an expert to be able to reconstruct the entire path of movement of the vehicle from the point of impact to the point of rest.’” (*Id.* at pp. 274-275.) Any varying factors impacting accident reconstruction “are relevant to the weight of an expert’s opinion rather than its admissibility if a proper foundation has been laid.” (*Id.* at p. 275.) In this case, we are satisfied the officers’ training and experience qualified them to give their opinions. We find no ground for reversal.

B. Instruction on Weight of Expert Testimony

Defendants claim that if the officers’ opinions were admissible, the trial court failed to instruct the jury to accord them only as much weight as it saw fit. (See *Wells Truckways, supra*, 122 Cal.App.2d at p. 678.) Defendants are wrong. The court instructed the jury on precisely that point: “During the trial, you heard testimony from expert witnesses. The law allows an expert to state opinions about the matters in his or her field of expertise, even if he or she has not witnessed any of the events involved in the trial. You do not have to accept an expert’s opinion. As with any other witness, it is up to you to decide whether you believe the expert’s testimony and choose to use it as a basis for your decision. You may believe all, part, or none of an expert’s testimony. In deciding whether to believe an expert’s

testimony, you should consider the expert's training and experience, the facts the expert relied on and the reasons for the expert's opinion."

C. Officer Talley's Demonstration with Water Bottles

At one point during her testimony, Officer Talley used two water bottles to briefly illustrate her testimony as to the movement of the parties' vehicles prior to, during, and after the collision. Defendants claim the trial court committed prejudicial error in allowing her to do so. Defendants did not object to this testimony in the trial court, so they have forfeited their argument. Even if not forfeited, the argument is meritless because defendants have not identified any possible prejudice from Officer Talley's brief cumulative illustration accompanying her testimony.

D. Officer Talley's Opinion of Ross's Credibility

Although not entirely clear, it appears the police report of the incident reflected Ross initially told the police he was traveling behind Kyle McDaris's car going southbound, but he changed his statement to the police to say he was traveling southbound behind Arias's truck. At trial he denied he gave conflicting statements to the police and claimed he had always said he was traveling southbound behind Arias's truck. When Officer Talley testified, she said Ross gave "[g]rossly conflicting" versions of the collision to her and Officer Martinez. She explained it was not common for witnesses to collisions to make inconsistent statements, so she "considered him to be not a credible witness, not someone I could rely on to give me factual information about how this collision had occurred."

Defendants claim the trial court erred in permitting Officer Talley's testimony because it took the issue of Ross's credibility away from the jury. Not so. Officer Talley simply explained why she did not credit Ross's statement in reaching her conclusions about the cause of the collision. The jury was free to give as much or as little weight to Ross's testimony in light of the rest of the evidence as it believed was warranted. We find no error warranting reversal.

5. Defense Expert Witness Dr. Carpenter

A. Dr. Carpenter's File

Because Dr. Carpenter's file had not been produced during discovery, the court ordered defendants to produce his file 24 hours before he testified at trial. The court cited its "inherent power to govern the proceedings and make them fair to both sides; prevent undue waste of time fumbling through the expert's reports." Defendants now argue the trial court erred in ordering disclosure of Dr. Carpenter's file without conducting an *in camera* review to prevent disclosure of attorney work product. But defendants cite nothing in the record to suggest they raised any work product objections to anything in Dr. Carpenter's file or requested in camera review, so they forfeited their argument. (See *People v. Combs* (2004) 34 Cal.4th 821, 862.) Even if their objections were not forfeited, they have not identified any information in Dr. Carpenter's file that might have been subject to a work product privilege, so they have failed to show any error warranting reversal.

B. Dr. Carpenter's Testimony

Defendants also argue the trial court erred by "attacking" Dr. Carpenter's qualifications and credibility in front of the jury and striking a portion of Dr. Carpenter's opinions. Again, we review the trial court's admission or exclusion of expert testimony for abuse of discretion (*Griffin, supra*, 200 Cal.App.4th at p. 639) and we find none warranting reversal.

As foundation, Dr. Carpenter testified he was a biomechanical engineer. He had a bachelor's degree in civil engineering, a master's degree, and a Ph.D. (he did not specify the field), and had taught university courses in structural mechanics and dynamics. He had also taken courses in human anatomy, cadaver laboratory, and biomechanics, and had attended lectures and conferences on biomechanics. For over 20 years he had observed and been involved in vehicle collision tests and had published some of his work.

The trial court's purported "attack" on Dr. Carpenter's credibility came when defense counsel asked him, "[A]s a biomechanical engineer, please explain to the ladies and gentlemen what we just touched on, the difference between the fact that it was -- his shoulder was pushing on the door versus pulling." The court interjected, "First of all, I

don't have any testimony that he is a biomechanical engineer. Could you bring that out? What is his degree in? I didn't get that. He has a degree, a Ph.D. What is it in?"

Dr. Carpenter explained his degree was in applied mechanics, and he had studied human anatomy and taken graduate level courses in biomechanics and biomedical engineering. He explained most people in the biomechanical field do not have degrees in biomechanics and when he was in school, there were no degrees offered in biomechanics. The court found he had "some expertise" and overruled Arias's objections to Dr. Carpenter's qualifications.

We find nothing in this exchange constituting an "attack" on Dr. Carpenter's qualifications or credibility. The court was simply ensuring Dr. Carpenter was qualified to give his opinions. Nor can we identify any possible prejudice from the trial court's request for more information about Dr. Carpenter's background and qualifications.

Later during his testimony, Dr. Carpenter was asked his opinion on the stress to Arias's shoulder in the accident, and testified, "I don't think that it was stressful. The door and the seat belt, I don't believe produced impingement so to speak. Impingement is a feature within the anatomy and it's not produced by external pressure of this kind." Arias objected, and the court ruled, "Well, it's just not a scientific statement. With all due respect to the doctor, to say something that is not that stressful is not a scientific opinion. So it is stricken and you're to disregard it." Dr. Carpenter then opined, "I find there's no substantial stress to the AC space and no tension or what would be the stress to cause a tear, then, to the muscle tendons involved in this case." Arias again objected and the trial court struck his opinion related to stress, but allowed defense counsel to lay further foundation.

The court then asked Dr. Carpenter what calculations he had done in this case. Dr. Carpenter responded, "What I calculate or predict is that the direction of the compression is not -- when I say 'stress,' I'm referring to it in the physical sense, it's force per area. And for the tendon to have stress, you have to stretch the tendon. You can't press the humerus against the body and from that produce tension because you're moving in the wrong direction. [¶] So I would calculate in predicting this that we're moving in a direction that pushes the arm towards the body, and that is a direction that is not stressing or straining the tendon. And, again, by strain, I'm referring to the change in length per length, and it's

not straining it in the sense is [*sic*] that we're not moving. It's in effect like the calculation of having a rope and I'm pushing on the rope. And that's not stressing the rope. It doesn't -- it's not stressed by compression. It can only be stressed by tension and that's my calculation." The court responded, "Well, he's given an opinion regarding the stress or lack thereof. As to the degree of the stress, the opinion is excluded because it's not -- the degree is not calculated other than to say it's not that stressful. That's not a scientific opinion and it's stricken. And you're to disregard it." Outside the presence of the jury, the court repeated, "[H]e's given opinions about the delta-V. He's given opinions about the pushing or pulling force as to whether it's a stress or not. But as to the degree of force, to say that something is not that stressful, it's not a scientific opinion that's helpful to the jury." After that exchange, Dr. Carpenter was permitted to express his opinion that there was no "mechanism for mechanical tearing of muscle tendon" in the accident because "there is no tension to the muscle tendons at issue in this case."

We find no abuse of discretion from the trial court's limited striking of Dr. Carpenter's opinions on the *degree* of stress, given Dr. Carpenter did not measure or calculate the degree of stress during the accident. Even if Dr. Carpenter's testimony was erroneously circumscribed, defendants have not shown prejudice. Dr. Carpenter was permitted to give the key opinion for the defense -- the accident would not have created tension on Arias's rotator cuff causing his injury. The jury must have rejected that conclusion in favor of the ample contrary evidence, including Dr. Tauber's causation testimony and testimony from defendants' own medical expert, Dr. Kay, who agreed with Dr. Tauber that the accident increased Arias's pain, made his shoulder condition symptomatic, and caused Arias's supraspinatus tendon to become inflamed and painful. Thus, there was no reasonable probability defendants would have obtained a better outcome if Dr. Carpenter had been allowed to opine on the degree of stress to Arias's tendons during the accident.

DISPOSITION

We reduce the judgment to reduce Arias's past economic damages award by \$2,281.34 to \$125,846.02 and affirm the judgment as modified. Respondent is awarded costs on appeal.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.